

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA BOARD OF PSYCHOLOGY

In the Matter of the Psychology License  
of Steven Alan Carlson, Psy.D., L.P.  
License No. LP0474

RULING REGARDING  
COMMITTEE'S MOTION TO  
AMEND NOTICE OF HEARING  
TO CONFORM TO EVIDENCE

The above matter is pending before the undersigned Administrative Law Judge. On May 4, 1999, following the conclusion of the hearing and at the same time that the Complaint Resolution Committee of the Board of Psychology filed its Post-Hearing Memorandum and proposed Findings of Fact, the Committee also filed a Motion to Amend the Notice of Hearing to Conform to the Evidence. The Respondent filed a Memorandum in Opposition to the Motion on May 14, 1999. The Committee filed a Reply on May 17, 1999, and the Respondent filed a letter responding to the Committee's argument regarding timeliness on May 19, 1999. The record with respect to the Motion closed on May 19, 1999.

Appearances: Kristine I. Legler Kaplan, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, on behalf of the Complaint Resolution Committee of the Board of Psychology; Philip G. Villaume, Attorney at Law, Philip G. Villaume & Associates, 5200 Willson Road, Suite 150, Edina, Minnesota 55424, on behalf of the Respondent, Dr. Steven A. Carlson.

Based upon all of the files, records, and proceedings herein, and for the reasons discussed in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. The Committee's Motion to Amend Notice of Hearing to Conform to the Evidence is GRANTED.
2. The Committee shall file its Amended Notice of Hearing by June 1, 1999. In the Amended Notice of Hearing, the Committee shall clarify the conduct of Respondent that is alleged to have violated Minn. R. 7200.4900, subps. 5, 6 and 9.
3. A conference call shall be held on Friday, June 4, 1999, at 10:30 a.m. to discuss whether the Respondent wishes to submit additional testimony, affidavits, and/or exhibits to meet the additional allegations of the Amended Notice of Hearing, set a date for any such additional proceedings or submissions, and set deadlines for the submission of any supplemental

post-hearing briefs or Proposed Findings of Fact concerning the additional allegations.

Dated this 24th day of May, 1999

---

BARBARA L. NEILSON  
Administrative Law Judge

MEMORANDUM

On May 4, 1999, the Complaint Resolution Committee of the Board of Psychology ("the Committee") filed with its post-hearing memorandum a Motion to Amend its Notice of Hearing to conform to the evidence presented at the hearing. Specifically, the Committee requested that it be permitted to amend the Notice of Hearing to add three additional factual allegations: (1) the Respondent provided an altered record of Client #5's termination summary in response to the Board's subpoena issued during the investigation of this matter which omitted information contained in a subsequently discovered record (Exhibit 38A) that shows that the Respondent and Client #5 were contemplating a continuing relationship at the time therapy ended; (2) in his appearance before the Committee in July 1996, the Respondent was untruthful when he told the Committee that he had not engaged in a sexual relationship with Client #5; and (3) the Respondent was untruthful when he indicated in response to discovery requests and earlier inquiries from investigators for the Office of Attorney General that his personal journals had been destroyed. The Committee seeks to assert in the Notice of Hearing, as amended, that this conduct was unprofessional conduct in violation of Minn. Stat. § 148.941, subd. 2(a)(3) and Minn. R. 7200.5700, demonstrates a failure to cooperate with the Committee's investigation as required by Minn. R. 148.941, subds. 2(a)(8) and 4, reflects adversely on the Respondent's ability or fitness to practice in violation of Minn. Stat. § 148.941, subd. 2(a)(4), and was likely to deceive or defraud the public or the Board in violation of Minn. Stat. § 148.941, subd. 2(a)(2) and Minn. R. 7200.5600.

The Committee also moves to amend the Notice of Hearing to assert that the "Respondent's conduct as described at the hearing and in the Notice of Hearing" additionally constitutes violations of three additional provisions of the Rules of Conduct governing psychologists: (1) Minn. R. 7200.4900, subp. 5 (a psychologist who becomes aware of a divergence of interests, values, attitudes, or biases sufficient to impair the professional relationship shall so inform the client and either the client or the psychologist may terminate the relationship); (2) Minn. R. 7200.4900, subp. 6 (a psychologist shall terminate a professional relationship with a client when the client is not likely to benefit from continued services, shall inform the client orally and in writing of the termination, and shall assist the client in obtaining services from another professional); and (3) Minn. R. 7200.4900, subp. 9 (a psychologist shall, consistent with the wishes and best interests of the client, coordinate services for that client with other mental health professionals). The Committee attached to its motion a letter sent by counsel for the Committee to counsel for the Respondent before the hearing began in

which the Committee announced its intention to seek to amend the pleadings after the hearing to conform to the proof of the Respondent's alleged lies to the Committee concerning the existence of his journals and the nature of his relationship with Client #5.

The Respondent contends that the Committee's attempt to amend its Notice of Hearing to include additional allegations after the close of evidence and testimony denies Respondent his due process rights under state law and the federal constitution. The Respondent asserts that the motion is untimely and prejudicial and argues that the Respondent was not provided an opportunity to meet the allegations. The Respondent contends that the February 22, 1999, letter did not provide Respondent with adequate notice since it did not specifically state the allegations, issues, or statutes or rules allegedly violated. The Respondent also argues that the motion is insufficient in that it does not specifically reference any testimony or evidence admitted at the hearing regarding these matters.

Pursuant to Minn. R. 1400.5600, subp. 2, the Notice of and Order for Hearing is required to contain "[a] statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of the case . . . ." Subpart 5 of the same rule specifies that, "[a]t any time prior to the close of the hearing, the agency may file and serve an amended notice of and order for hearing, provided that, should the amended notice and order raise new issues or allegations, the parties shall have a reasonable time to prepare to meet the new issues or allegations if requested." (Emphasis added.) This rule is intended to permit an agency to submit an amended Notice of and Order for Hearing during the course of the hearing itself without a formal motion to amend as long as the parties have a reasonable time to prepare to meet the new allegations. The Committee did not submit its motion to amend before the conclusion of the hearing testimony in this matter, and thus may not rely upon Minn. R. 1400.5600, subp. 5, as the basis for its motion.

The rules of the Office of Administrative Hearings further provide that, "[i]n ruling on motions where parts 1400.5100 to 1400.8400 are silent, the judge shall apply the Rules of Civil Procedure for the District Court for Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding." Rule 15 of the Rules of Civil Procedure relates to amended and supplemental pleadings. Rule 15.01 provides that, apart from amendments to pleadings as of right (those made within 20 days after the pleading was served or before a responsive pleading was served), "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Minnesota courts applying this rule provision have generally followed the admonition that amendments be liberally allowed and "amendments are liberally granted in practice. Unless parties opposing an amendment can establish prejudice, other than merely having to defend against an additional claim or defense, amendments will be allowed."<sup>[1]</sup> With respect to amendments to conform to the evidence, Rule 15.02 specifies as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of a trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admissions of such evidence would prejudice maintenance of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

This rule was “designed to overcome the unwillingness judges may feel to permit amendments coming late in the action.”<sup>[2]</sup> The sort of prejudice that will prevent the amendment “must be more than inconvenience or loss of tactical advantage . . . . The loss of evidence, death or unavailability of witnesses, or the inability to produce evidence or witnesses which would have been available may serve to establish prejudice going to the merits of the case.”<sup>[3]</sup> Under the rule, the court is allowed to order a continuance to enable the party to have a fair chance to respond to the new evidence. The Minnesota Supreme Court has indicated that it would prefer that courts permit such amendments and order continuances rather than merely denying the motion to amend.<sup>[4]</sup>

The allegation that the Respondent initially lied about his sexual relationship with Client #5 was raised by the Committee in its Motion for Summary Disposition. In the ruling on the Committee’s motion, the Administrative Law Judge decided that it would not be appropriate to enter summary disposition for the Board on its “failure to cooperate” count because “no specific allegation was included in the Notice of and Order for Hearing relating to this assertion [that the Respondent did not provide accurate information when he met with the Committee and denied having a romantic or sexual relationship with Client # 5] and the Board has not sought to amend the Notice of and Order for Hearing to include such an allegation.”<sup>[5]</sup> Shortly after the Administrative Law Judge issued this ruling on the Committee’s motion for summary disposition and prior to the commencement of the hearing, counsel for the Committee informed counsel for the Respondent by letter that it intended “when this matter is over” to amend its Notice of Hearing to conform to the proof to allege that the Respondent had lied to the Committee when he said in July 1996 that he was not engaged in a sexual relationship with Client #5. In the same letter, counsel for the Committee notified counsel for the Respondent that the Committee would “demonstrate that your client lied to the Board concerning the existence of his journals, and will amend the Notice of Hearing as necessary after the hearing . . . .”<sup>[6]</sup>

The Administrative Law Judge concludes that, in the interest of efficiency and due process, it is appropriate to grant the Committee's motion to amend the Notice of Hearing in the present proceeding, provided that the Respondent is afforded an opportunity to submit additional testimony, affidavits, and/or exhibits to meet the additional allegations. With respect to the first additional factual allegation (the allegation that the Respondent provided an altered record of Client #5's termination summary), the existence of a second version of the termination summary was only discovered after the hearing when the Administrative Law Judge reviewed the original file relating to Client #5.<sup>[7]</sup> The Committee apparently was unaware of the existence of a second version of the summary prior to that time. Therefore, it would not have been possible for the Committee to seek to amend the Notice of Hearing to refer to this additional allegation prior to the end of hearing testimony. The allegation that the Committee seeks to add is similar to the allegations already made with respect to the records maintained by the Respondent on Client #2. With respect to the other two factual allegations sought to be added (alleged dishonesty concerning the sexual relationship with Client #5 and the Respondent's journals), it would have been preferable if the Committee had sought to amend the Notice of Hearing prior to or during the hearing with respect to the factual allegations involving. Such an approach would have ensured that the Respondent was fully aware during the hearing that the Committee wished to include these allegations as a basis for the proposed disciplining of the Respondent's license. However, the Committee did, as discussed above, send a letter to the Respondent in advance of the hearing placing him on notice that the Committee would seek to amend the Notice of Hearing after the hearing to conform to the evidence presented on these two issues. In addition, the Respondent did not object when testimony was in fact offered during the hearing regarding these two matters. Therefore, it is appropriate to allow the amendment of the Notice of Hearing with respect to these two additional factual allegations. Because the Administrative Law Judge recognizes that the Respondent may have viewed these matters as peripheral at the time of the hearing and thus may not have had the same incentive to thoroughly respond to the Committee's production of evidence on these points, it is proper to afford the Respondent an additional opportunity to respond to these allegations now that they have been formalized.

The Committee will also be permitted to amend the Notice of Hearing to assert the three additional rule violations. These rule violations are very similar to several other rule provisions upon which the Committee relied in the original Notice of Hearing. The Committee asserted in its motion papers that the Respondent has violated the additional rule provisions by virtue of his "conduct as described at the hearing and in the Notice of Hearing." This assertion lacks specificity and does not provide the Respondent with adequate notice of the conduct that the Committee alleges gave rise to the violations. Accordingly, the Committee has been directed to clarify the conduct of Respondent that is alleged to have violated Minn. R. 7200.4900, subps. 5, 6 and 9 when it files the Amended Notice of Hearing.

B.L.N.

---

<sup>[1]</sup> D. Herr & R. Haydock, Vol. 1 *Minnesota Practice, Civil Rules Annotated* § 15.5 at 359 (West Group, 1998), *citing Hughes v. Micka*, 269 Minn. 268, 130 N.W.2d 505 (1964); *Crum v. Anchor Casualty Co.*, 264 Minn. 378, 119 N.W. 2d 703 (1963); and *Nelson v. Glenwood Hills Hospitals*, 240 Minn. 505, 62 N.W.2d 73 (1953).

<sup>[2]</sup> *Id.*, § 15.7 at 379.

<sup>[3]</sup> *Id.* at 379-80.

<sup>[4]</sup> *Marquardt v. Stark*, 239 Minn. 107, 58 N.W.2d 273 (1953).

<sup>[5]</sup> February 16, 1999, Letter from the Administrative Law Judge to counsel for the parties at 4.

<sup>[6]</sup> *Id.*

<sup>[7]</sup> See March 18, 1999, Letter from the Administrative Law Judge to counsel for the parties at 2.